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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 18

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

AMICUS CURIAE BRIEF OF THE COUNTY OF CUYAHOGA, A POLITICAL SUBDIVISION OF THE STATE OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,
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STATE OF OHIO,
Respondent.

AMICUS CURIAE BRIEF OF THE COUNTY OF CUYAHOGA, A POLITICAL SUBDIVISION OF THE STATE OF OHIO.

OPINION BELOW.

The opinion of the Ohio Supreme Court (R. 15-16) is reported at 175 Ohio St. 73, 191 N. E. 2d 825 (1963).

INTEREST OF AMICUS CURIAE.

This brief is filed by the Prosecuting Attorney for Cuyahoga County, Ohio, on behalf of the County of Cuyahoga, State of Ohio, as amicus curiae pursuant to Rule 42, because the Prosecuting Attorney is charged by law with the investigation and prosecution of crimes arising in said county and consequently is interested in the determination of the issues presented by this case.

STATEMENT OF THE CASE.

The following statement of the case is substantially the same as that appearing in the brief filed on behalf of the respondent by the Director of Law of the City of Cleveland and the Chief Police Prosecutor, who prosecuted this case in the Municipal Court of Cleveland, Ohio.

The police officers involved in the instant arrest had received confidential information that the Petitioner, William Beck, was carrying on a clearinghouse operation, scheme of chance. They also knew that the same William Beck had a record of three previous arrests and convictions which were indicative of the fact that he was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. They also had a photograph of the accused.

The officers were members of the Bureau of Special Investigation Unit of the Cleveland Police Department. They knew where to look for the petitioner. They went to that locality at a time of day when "pickup men" are most active picking up slips. They knew, from their own personal knowledge of the past history of Beck together with the information they had received, that if they did find Beck operating a motor vehicle in such neighborhoods they would have reasonable ground to arrest him.

It was about one o'clock in the afternoon of November 10, 1961 when the Defendant was first seen operating a motor vehicle on Beulah Avenue north of East 115th Street. The Defendant was ordered to stop, the police officers identified themselves, then searched the automobile but found nothing. The Defendant nevertheless was placed under arrest as being connected with the carrying on of a scheme of chance, conveyed to the 5th District where he was searched. An envelope with sheets of clearinghouse slips was found on his person. The De-

fendant subsequently was tried and found guilty as charged.

The Defendant was charged with violating Section 2915.111 of the Revised Code of Ohio. Before proceeding to hear the trial on the merits, the Court entertained a motion to suppress the evidence. The Defendant offered testimony to show that in his opinion the motion to suppress should be granted. The Court, however, overruled the motion, contending the arrest was lawful and the search was incidental to the arrest; that the arrest was made upon reasonable grounds that a felony had been committed.

It was stipulated by the petitioner that the facts upon trial would be the same as the evidence presented on the motion to suppress. On the basis of the stipulation and the clearinghouse slips received into evidence, the trial court found the petitioner guilty as charged.

In due course application for new trial was made and overruled. The case was reviewed by the Court of Appeals of Cuyahoga County which affirmed the judgment of the trial court. The following statement appeared in the *Legal News* of this city:

> "25890. M.C.—State of Ohio vs. Beck. Judgment affirmed. The record discloses bona fide arrest of deft. during commission of felony (Section 2915.-111, R. C.) reported to police officer by informant, Knowledge of police officer of previous convictions of deft. for like offense and locale and method of committing said crime and we conclude and hold therefrom that there was probable cause for the arrest, that search of person was reasonable and, therefore, lawful, and that the disclosure of the name of the informant to be neither relevant nor material in the cause, Ballard vs. State, 43 Ohio St. 340; In re Quaries and Butler, in re McEntire and Goble, 158

U. S. 532, 535; State vs. Viola, 51 Abs. 577; Wigmore on Evidence, Vol. 8; para. 2374, page 751, 752, 756. Exceptions. O.S.J.".

Thereupon the petitioner filed in the Supreme Court a motion to certify the record and appeal as of right. The motion was granted and the court heard the case on the merits. Judgment of the Court of Appeals was affirmed, *State vs. Beck*, 175 O. S., p. 73.

QUESTIONS PRESENTED.

1. Were the clearinghouse slips obtained by an illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2. Did the trial court err in refusing to order the police to disclose the identity of the informer?

ARGUMENT.

1. There was no illegal search and seizure in this case, and the refusal of the trial court to sustain the motion to suppress was not erroneous.

Whether the search of the defendant and seizure of the clearinghouse slips was legal depends, of course, on the reasonableness of the search. This Court has laid down the standards of reasonableness many times and has held that a search which is incidental to a valid arrest, as in this case, does not constitute an unreasonable and illegal search. *Harris v. United States,* 331 U. S. 145, 91 L. ed. 1399, 67 S. Ct. 1098.

The doctrine that a search without a warrant may be conducted if incidental to a lawful arrest is a long established principle of law. In *Ker v. California,* 374 U. S. 23, 41, 10 L. ed. 726, 742, 83 S. Ct. 1623, 1634 (1963), this Court said:

> "* * * The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927); Harris v. United State. 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); Abel v. United States, 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. (2d) 668 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal. L. Rev. 474, 490-493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v. United States, supra, 275 U. S. at 198-199, 48 S. Ct. at 76-77, 72 L. Ed. 231; United States v. Rabinowitz, supra, 339 U. S. at 61, 70 S. Ct. at 433, 94 L. Ed. 653; cf. Agnello v. United States, 269 U. S. 20, 30-31, 46 S. Ct. 4, 5, 6, 70 L. Ed. 145 (1925) * * *."

Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks v. United States*, 232 U. S. 383, 392 (1914); *Agnello v. United States*, 269 U. S. 20, 30 (1925).

If the arrest was legal, the contemporaneous search was also legal and contraband procured therein would be legally admissible in evidence.

When incident to a lawful arrest, a search without a warrant is reasonable. This is an exception to the constitutional provisions based upon necessity. *Johnson v. United States*, 333 U. S. 10; *Giordenello v. United States*, 357 U. S. 480; *Draper v. United States*, 358 U. S. 307.

In *United States v. Rabinowitz*, 339 U. S. 56 (1950), 94 L. Ed. 653, the headnotes 2, 4, and 6 read as follows:

"2. The right to search, without a search warrant, the person of an accused, when legally arrested, has always been recognized under English and American law."

"4. What is a reasonable search not prohibited by the Fourth Amendment is not to be determined by any fixed formula, but depends upon the facts and circumstances of each case."

"6. A search without warrant does not violate the constitutional prohibition against unreasonable searches and seizures merely because the officers who carry out the search failed to procure a search warrant, although they had time to do so, since the legality of such a search turns upon the reasonableness under all the circumstances, and not upon the practicability of procuring a search warrant (overruling *Trupiano v. United States*, 334 U. S. 699)."

In *Harris v. United States*, 331 U. S. 145, 91 L. Ed. 1399, it is stated in headnote 5 as follows:

> "5. The test of reasonableness by which the constitutional permissibility of a search and seizure is determinable cannot be stated in rigid and absolute terms. *Each case is to be decided on its own facts and circumstances.*" (Emphasis supplied.)

The prohibition by the Fourth Amendment of unreasonable searches and seizures does not preclude search and seizure without a search warrant where incident to lawful arrest.

The necessity which justifies a search incident to an arrest arises from the need to protect the arresting officer, to deprive the prisoner of potential means of escape and to prevent the destruction of evidence. This destruction might consist of the dissipation of a narcotic drug by use by an addict. The arrest must be based on the existence of probable cause (or reasonable grounds, the terms being used interchangeably by the courts) for an arrest prior to the search. *McDonald v. U. S.*, 335 U. S. 451.

In *Brinegar v. United States*, 338 U. S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949), this Court defined "probable cause" as follows:

> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' McCarthy v. De Armit, 99 Pa. 63, 69, * * *. Probable cause exists where 'the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162 * * *.
>
> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interfer-

ences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

The Supreme Court of Ohio in the instant case stated as follows:

"Next, was there probable cause for making the arrest? 'Probable cause' is incapable of any exact definition applicable to all cases. However, the Supreme Court of the United States said in Henry v. United States, 361 U. S. 98, 102, 4 L. Ed. (2d) 134, 80 S. Ct. 168:

" 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.'

* * *

"Therefore, a question of fact is presented in each case, and where the facts in the possession of the police are sufficient to cause a reasonable and prudent man to believe that a felony has been committed and the accused committed it, probable cause is present." 175 Ohio St. 75-76.

The reasonableness of a search and seizure is a question of fact to be determined in the first instance by the trial court. *State v. Young*, 91 Ohio Law Abs. 21, 185 N. E.

2d 33 (1962). This determination must, however, be made in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. *Ker v. California, supra.*

The law of arrest is determined by the law of the state where the arrest is made. In *U. S. vs. Di Re,* 332 U. S. 581, 588, 92 L. Ed. 210, 217, 68 C. Ct. 222, Justice Jackson states the rule in the majority opinion:

> "We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeable to the usual mode of process against offenders in such state." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest."

The reasonableness of the search in this case then turns upon the question of whether there was probable cause to arrest the petitioner at that particular time and place and under the prevailing conditions. Section 2935.04 of the Revised Code of Ohio specifically provides that when there is reasonable ground to believe that a felony has been committed, an officer may, without a warrant, arrest one whom he has reasonable cause to believe guilty of the offense and detain him until a warrant can be secured.

The situation here was not one where a beat patrolman more or less arbitrarily arrested someone on mere suspicion and proceeded to search him. The arresting officer here was assigned to the Bureau of Special Investi-

gation of the Cleveland Police Department, and had many times dealt with clearinghouse and similar operations. He had received information about petitioner's activities and whereabouts, had made his own observations, and knew that Beck had been convicted three times in connection with clearinghouse and gambling. The officer had reason to believe, from his knowledge of clearinghouse and previous observation in addition to the information given him by the informer that Beck would be in that particular vicinity at about that time of day, in connection with clearinghouse activities, and when he saw Beck there, he properly proceeded to arrest him under the belief that a felony had been committed.

As stated in the opinion of the Ohio Supreme Court: "Here, there was not an arrest merely for an exploratory search. According to the testimony, the police, based on the information they had, were actually looking for the defendant for the purpose of arresting him."

Petitioner contends that the search was unreasonable in that the officers could practicably have obtained a search warrant. The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest.

This Court in the *Ker* case at page 31 stated that the *Mapp* case, however,

> "* * * established no assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U. S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."

The Court further, at page 33 of the *Ker* case, said:

> "* * * We reiterate that the reasonableness of a search is in the first instance a substantive determi-

nation to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees * * *"

In *Draper v. United States*, 358 U. S. 307, at 313, the Court said:

"In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. Brinegar v. United States, supra (338 U. S. at 175). Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves, to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162, 69 L. Ed. 543, 555, 45 S. Ct. 280, 39 A. L. R. 790."

The right to seize clearinghouse slips, such as in the within case, when the possession of it is a crime, can not be questioned.

In *Harris v. United States*, 331 U. S. 145, sec. 91 L. Ed. 1399, this Court upheld the right to seize such property. Headnote 11 reads:

"11. A distinction exists between merely evidentiary materials which may not be seized either under the authority of a search warrant or during the course of a search incident to an arrest, and those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person might be effected, and

property the possession of which is a crime." (Emphasis supplied.)

A situation somewhat similar to that in the case at bar is presented in *U. S. v. Pierce*, 124 F. Supp. 264 (D. C. Ohio 1954), affd. 224 F. 2d 281 (6th Cir. 1957) where the police officers arrested an informer and found on his person a slip of paper bearing a telephone number of someone in Chicago. The informer told the officers that he had on several occasions procured heroin from such person. He called that person on the telephone and ordered heroin while the federal officers listened in to the conversation. Said person said he was leaving Chicago in about 40 minutes to deliver heroin to the informer. The officers then went to the railroad station and arrested the defendant, who fitted perfectly the description given them by the informer. The defendant had heroin in his possession. It was held that the arrest of the defendant without a warrant was proper, Section 2935.04 of the Revised Code of Ohio. In the opinion, by McNamee, District Judge, it is said at p. 266:

> "It is fundamental that not every search and seizure made without a warrant is illegal. As the Supreme Court said in United States v. Rabinowitz, 339 U. S. 56, 60, 70 S. Ct. 430, 432, 94 L. Ed. 653:
>
> > 'Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. Weeks vs. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 344, 58 L. Ed. 652.'
>
> See also Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543.
>
> State law determines the validity of arrests without warrant. United States v. Di Re, 332 U. S. 581, 68

S. Ct. 222, 92 L. Ed. 210. Revised Code of Ohio, Section 2935.04 provides:

> 'When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.'

Certainly the facts and circumstances within the knowledge of the officers were sufficient in themselves "to warrant a man of a reasonable caution in the belief" that the defendant was guilty of a felony in the unlawful possession of narcotic drugs in violation of Section 3719.02 of the Revised Code of Ohio, and Section 2553 of Title 26 U. S. C. A. Indeed, the only fair and reasonable inference to be drawn from the defendant's appearance in the railroad station in Cleveland in the early morning of November 5, 1953 is that he was there to deliver narcotic drugs to the informer, as he indicated he would in the telephone conversations heard by the officers but a few hours before. There was abundant justification for the arrest of the defendant without a warrant."

The majority of the Ohio Supreme Court found that the accused was arrested for a felony. This satisfies the requirement in Section 2935.04 of the Revised Code of Ohio that the arresting officer have "reasonable ground to believe that a felony has been committed," and "reasonable cause to believe (the accused) is guilty of the offense." Complaint is made that because the petitioner was ultimately charged with violation of Section 2915.111 of the Revised Code, and because the penalty for the first violation of that section brings it within the misdemeanor class of offenses, the arrest is illegal in that the arresting officer had no reasonable grounds for belief that a *felony* was being committed.

That the officer's belief was justified is evidenced by the fact that the search produced a quantity of clearinghouse slips concealed in one of the petitioner's socks. The arresting officer, because of his expert knowledge as a member of the Bureau of Special Investigation, had good reason to infer that the petitioner's role in the operation was that of the "pickup man," an integral part of the numbers or clearinghouse operation, and that as such the petitioner was guilty of aiding and abetting in the sale of "numbers game" ticket (Ohio Revised Code sec. 2915.11), also possession of "numbers game" ticket (Ohio Revised Code sec. 2915.111), and carrying on a "numbers game" (Ohio Revised Code sec. 2915.13). Except for a first violation of section 2915.111, the penalty provisions of all these sections (Appendix A) make any violation thereof a felony. Hence, the arresting officer could well have had reasonable cause to arrest the petitioner on a felony charge as a conspirator and for aiding and abetting in clearinghouse operations.

The trial court asked the officer (R. 11):

> "When you placed this man under arrest, did you place him under arrest for a felony or a belief that a felony had been committed?
>
> The Witness: Under a belief that a felony had been committed under the State law, carrying on a scheme of chance is a felony, and on that basis, I arrested him".

An arresting officer makes his determination of whether probable cause for arrest without a warrant exists, and the court reviews such determination, not as a legal scholar determines the existence of consideration in support of a promise, but as a man of reasonable prudence and caution would determine whether the person arrested has committed a felony. See *People v. Harper*, 365 Mich.

494, 113 N. W. 2d 808, cert. den. 371 U. S. 930, 9 L. ed. 2d 237, 83 S. Ct. 302.

In arresting without a warrant a conclusion must be drawn by the police officer supported by facts and circumstances sufficiently strong in themselves to warrant a cautious and prudent man to believe the accused guilty of the crime for which he was arrested. There may be wide divergence concerning the reasonableness of the inferences or conclusions drawn, based on the facts which may have justified the arrest of the accused. Such interpretation by the police officer may not coincide with that of the accused, his counsel or the court, and each problem must be resolved by the circumstances of each particular case and there again the doctrine of probable cause becomes important. See *Varon, "Searches, Seizures and Immunities"* (1961), Volume 1, p. 195.

The arresting officer in this case, on the basis of the information he received from the informer, together with his knowledge of the defendant's previous convictions in connection with clearinghouse and the officer's personal observation, had good reason to believe that the defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. The opinion of the Supreme Court of Ohio so finds (R. 17):

> "The Cleveland police had good reason to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. Police officers stopped (fol. 22) the car and searched it, without result. Defendant was then arrested and taken to a police station,

and his clothing was examined, resulting in the discovery and seizure of the illegal clearinghouse slips, which formed the basis of the charge against him and his subsequent conviction."

We submit, therefore, that there was no illegal search and seizure of the clearinghouse slips in this case, that the search was incident to a lawful arrest, and that the refusal of the trial court to sustain the motion to suppress was not erroneous.

2. There was no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer.

It is contended on behalf of the petitioner that prior to petitioner's arrest, the arresting officer knew "as a matter of personal knowledge" only that the petitioner had been arrested and convicted three times previously for clearinghouse operations, and whatever information of petitioner's activities the officer had came exclusively from the informer. It is argued that the accused should have been given the name of the informer in order that the latter's credibility could be tested. The record does not support this claim that the arresting officer's knowledge of the petitioner's current activities was derived solely from the informer. The officer testified (R. 8):

"Q. Did you have reasonable and probable cause to stop this man?

A. Yes, I did.

Q. Based on his previous record?

A. Information and previous record and observation."

Defense counsel did not cross-examine the officer as to the nature and extent of his observation, and has no-

where shown that the observation did not play an important part in the officer's determination that the arrest should be made.

The opinion of the Ohio Supreme Court in this case concludes that the revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated. The opinion distinguishes the situation in the instant case from that in *Roviaro v. United States*, 353 U. S. 53, L. ed. (2d) 639, 77 S. Ct. 623, where the informer not only gave information but took an active part personally in trapping and apprehending the offender.

The right to disclosure of the identity of the government's informers was considered by this Court in *Rugendorf v. United States*, ____ U. S. ____, 11 L. ed. 2d 887, decided March 30, 1964. The opinion in Rugendorf notes that in Roviaro "the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted." The opinion states that the petitioner in Rugendorf did not develop the criteria of Roviaro, i.e., that the necessity for disclosure depends upon "the particular circumstances of each case, taking into consideration the crime charged, the possibile defenses, the possible significance of the informer's testimony, and other relevant factors." We submit that the petitioner in the case at bar, as in Rugendorf, has failed to develop the criteria of Roviaro and show that the name of the informant was necessary to his defense. The *Rugendorf* case is cited in the opinion in *Aguilar v. Texas*, __ U. S. ____, 12 L. ed. 2d 723, as authority for the conclusion that the "identity (of the informant) need not be disclosed."

The general rule on disclosure of the identity of persons furnishing the government with information concerning the commission of crimes is stated in 8 *Wigmore, Evidence,* Section 2374 (McNaughton rev. 1961):

> "A genuine privilege, on the fundamental principle stated *supra* Section 2285, must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reaction and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> That the government has this privilege is well established, and its soundness cannot be questioned."

CONCLUSION.

In seeking reversal of petitioner's conviction for a "numbers" offense, the amici curiae quote the view of Mr. Justice Jackson in *McDonald v. United States*, 335 U. S. 451, 459 (1948) (concurring opinion) that while the "numbers" lottery is one that ought to be suppressed, its suppression is not more important to society than the security of the people against unreasonable searches and seizures. This illustrates the danger of quoting out of context, for if fully quoted the *McDonald* case would reveal that there the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. The majority opinion by Mr. Justice Rutledge stated:

> "* * *In prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me followed every step of their journey inside the house and tainted its fruits with illegality."

The case on review presents no parallel whatever with McDonald. As observed in the opinion of the Supreme Court of Ohio, the Cleveland police had good reason to believe that the petitioner was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. (175 O. S. 73.) This was not a situation

wherein a uniform policeman walking an assigned beat arbitrarily arrested and searched the petitioner. The arresting officer was a member of the Bureau of Special Investigation of the Cleveland Police Department. He went to the particular area at a definite time with information concerning the activities of the petitioner, with knowledge of the petitioner's record and the officer's own observation, and with a photograph of the petitioner. The officer arrested the petitioner for what the officer believed and had probable cause to believe was the commission of a felony.

This Court has left undisturbed the jurisdiction of the trial courts to determine in the first instance the test of reasonableness. The decisions of this Court have established that only unreasonable searches and seizures come within the interdict of the Fourth Amendment. *Mapp v. Ohio*, 367 U. S. 643, 6 L. ed 2d 1081, left undisturbed the jurisdiction of the state courts to determine in the first instance the "test of reasonableness." The standards of reasonableness cannot be stated in rigid and absolute terms. Each case is to be decided on its own facts and circumstances. Applying that test to the facts and circumstances of the case here on review, how can it be said that the officer did not have probable cause to arrest the petitioner at that time and place or that the subsequent search of his person at the police station violated the constitutional prohibition. Rather, the principles laid down in Mapp find reinforcement in this case.

Public policy and humanitarian concern support the rule concerning disclosure of the identity of the informer. Unfortunately for law enforcement, the fate of many informers whose names became known has been assassination at the hands of organized crime. In gambling, in narcotics, in prostitution,—the lifeblood of organized crime

—any interference with their operation has often resulted in prompt liquidation. This Court has held in a number of cases that where it is not shown (and in the vast majority of cases it cannot be shown) that the disclosure of the informer would aid in the defense of the accused, such identity need not be disclosed. As a matter of public policy that rule should not be disturbed.

We urge this Court to affirm the judgment of conviction in this case.

Respectfully submitted,

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APPENDIX A.

OHIO STATUTES INVOLVED.

Revised Code Section 2915.11. Manufacture, printing, and sale of "numbers game" tickets.

No person shall manufacture, print, vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

Revised Code Section 2915.111. Possession of "numbers game" ticket.

No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

Revised Code Section 2915.13. Promoting a "numbers game."

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for

or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.